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Commenter: Hyperion Telecommunications, Inc.
Applicant: BellSouth
State: Louisiana
Date: November 25, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Application by BellSouth	)	
Corporation et al. for Provision of	)	CC Docket No. 97-231
In-Region, InterLATA Services in	)	
Louisiana	)	

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. IN OPPOSITION TO BELLSOUTH'S APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA

Hyperion Telecommunications, Inc. ("Hyperion"), through undersigned counsel, hereby submits its reply comments on the Section 271 application for in-region interLATA authority in Louisiana, filed by BellSouth Corporation et al. ("BellSouth") on November 6, 1997.

BACKGROUND AND STATEMENT OF INTEREST

Hyperion is a diversified telecommunications company whose affiliates are providing or preparing to provide facilities-based local exchange service in twelve states. Within BellSouth's region, Hyperion affiliates are certificated as local exchange carriers in five states: Florida, Kentucky, Louisiana, Mississippi, and Tennessee. Hyperion affiliates presently have interconnection agreements with BellSouth in Florida, Kentucky, Louisiana, Mississippi and Tennessee. Hyperion has an immediate interest in helping the Commission to properly evaluate BellSouth's compliance with the competitive checklist of Section 271 of the Communications Act of 1934 ("Act").

INTRODUCTION

BellSouth fails to satisfy the competitive checklist in two respects. BellSouth does not provide reciprocal compensation (as required by Section 271(c)(2)(B)(xiii)) or nondiscriminatory access to operations support systems ("OSSs") (as required by Sections 271(c)(2)(B)(ii) and (xiv)). To be more specific, BellSouth refuses to pay reciprocal compensation for traffic terminated to customers of Hyperion who are Internet service providers, as well as customers of other competitive local exchange carriers ("CLECs") who are Internet service providers. BellSouth's application also does not demonstrate that CLECs have nondiscriminatory access to BellSouth's OSS functions. BellSouth's application lacks data on average service installation intervals and, therefore, cannot refute the evidence that its intervals for provisioning resold services to CLECs are discriminatory. In addition, BellSouth's Local Exchange Navigation System ("LENS") suffers from several infirmities, as described in more detail below.

ARGUMENT

I. BELLSOUTH'S APPLICATION FAILS THE COMPETITIVE CHECKLIST IN REGARD TO PROVIDING RECIPROCAL COMPENSATION

The competitive checklist requires Regional Bell Operating Companies ("RBOCs") requesting interLATA authority to provide "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. § 271(c)(2)(B)(xiii). Section 252(d)(2) requires RBOCs to comply with section 251(b)(5), which in turn requires reciprocal compensation arrangements for transport and termination of "telecommunications." 47 U.S.C. §§ 251(b)(5) & 252(d)(2). BellSouth, following the lead of other RBOCs, has taken the position that it will not provide reciprocal compensation for local calls terminating with an information service provider ("ISP"), including Internet service providers. BellSouth Brief at 64. But the obligation to pay reciprocal compensation for transport and termination of "telecommunications" contains no exception for calls to ISPs. Consequently, BellSouth's refusal to pay reciprocal compensation for such calls violates the competitive checklist.

Furthermore, BellSouth's interconnection agreement with Hyperion obligates BellSouth to pay reciprocal compensation on all traffic that meets certain parameters without regard to the identity of the called party.[1/] The Commission should not sustain BellSouth's attempt to evade these contractual obligations merely by referencing the identity of the called party.

BellSouth argues that in this proceeding its position is protected by the decision of the Louisiana Public Service Commission ("PSC") approving its rates for transport and termination. BellSouth Brief at 64. But neither the Louisiana Commission's decision approving BellSouth's Statement of Generally Available Terms and Conditions ("SGAT"),[2/] nor its final Pricing Order,[3/]

[1/] The Interconnection Agreement between BellSouth and Entergy Hyperion Telecommunications of Louisiana provides: "The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer." (Atch. 6 § 5.1). "Local Traffic" is defined as "any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which Bell South has a local interconnection agreement with an independent LEC, with which Hyperion is not directly interconnected." Atch. 11 p. 6. Copies of the relevant provisions are attached.

[2/] BellSouth's SGAT sets forth its rates for reciprocal compensation. See SGAT Atch. A p. 7. (A copy of the SGAT appears as Exh. AJV-1 to the Varner Affidavit, App. A Tab 14.)

[3/] Louisiana PSC, Order No. U-22022/22093-A (Oct. 22, 1997), which appears in Appendix C-3, Tab 285.

do anything other than approve the level of rates. There is nothing in the PSC's decisions discussing or approving BellSouth's proposal not to pay any transportation or termination charges for calls to CLEC customers that happen to be ISPs. In fact, the terms of BellSouth's SGAT regarding payment of reciprocal compensation for local traffic are very similar to Hyperion's interconnection agreement. See SGAT at § XIII.A.

Moreover, Congress specifically conferred on this Commission, rather than state commissions, the jurisdiction to make a final determination of checklist compliance. Although this Commission must "consult" with state commissions under Section 271(d)(2)(B) of the Act, it alone — and not the Louisiana Commission — has the duty and authority to make the final decision. *Ameritech,* ¶ 285.[4/] Thus, the Commission is not bound by the Louisiana Commission's findings.

BellSouth's position on reciprocal compensation also bears on the public interest issue. If CLECs cannot recover their costs for the transport and termination of calls to ISPs, they would face enormous, uncompensated costs, since the overwhelming majority of ISP traffic is incoming, and the overwhelming majority of the incoming traffic comes from BellSouth's customers. The result could well be to force CLECs out of the ISP market, giving BellSouth a *de facto* monopoly of this market and resulting in increased costs to ISPs and ultimately their customers. The result would be totally at variance with the public interest that Congress has

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[4/] *In the matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, CC Docket 97-137 (rel. August 19, 1997) ("*Ameritech*").

declared in preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." 47 U.S.C. § 230(b)(2).

II. BELLSOUTH'S APPLICATION DOES NOT DEMONSTRATE THAT BELLSOUTH PROVIDES NONDISCRIMINATORY ACCESS TO ITS OSS FUNCTIONS.

To obtain Section 271 authority to offer in-region interexchange services, BellSouth must show that it provides "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" and that its "[t]elecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. §§ 271(c)(2)(B)(ii) & (xiv). In *Ameritech*, the Commission interpreted these sections also to include the "duty to provide nondiscriminatory access to OSS functions." *Ameritech*, ¶ 131. BellSouth's application attempts to demonstrate compliance with this duty, but falls short in several respects.

A. BellSouth's Application Does Not Present Comparative Data on Average Installation Intervals for Retail and Wholesale POTS Services

Ameritech required applicants under Section 271 to submit comparative data on average installation intervals for both the applicant's retail POTS services and their wholesale analogue. *Ameritech*, ¶ 166. In other words, the data must compare the average time it takes for the applicant's retail customers to have service installed with the average time it takes for customers of resellers, using the applicant's wholesale services, to have service installed.

BellSouth's application fails to present any data on this issue for resale orders. All it presents is a commitment to establish performance standards and collect future data; and even as to future data, for the crucial issue of the time it takes to accept or reject an order, BellSouth states that "sufficient BST data do not exist, and the CLEC results will be produced without direct comparison to BST." Stacy Performance Aff't ¶ 25 and Exh. WNS-6 (emphasis added). Moreover, BellSouth's commitment to collect future data will apply only to resale of POTS, which omits a significant segment of the competitive market demanding complex services. Stacy Performance Aff't Exh. WNS-6.

BellSouth does present performance data (rather than merely a commitment to collect data) for ordering and provisioning unbundled loops. However, this data shows only the time intervals that occur after "the issue date of the service order received from the CLEC." Stacy Performance Aff't ¶ 45 and Exh. WNS-11. This does not address the problems that arise at the preordering stage. Nor is BellSouth accurate in its statement that it has provided data showing average installation intervals for unbundled loops. BellSouth Brief at 73. The only support cited for that statement is data showing "% Order Due Dates On Time." Stacy Performance Aff't ¶ 44 and Exh. WNS-10 at pp. 3 and 4. That data does not show average installation intervals as required by *Ameritech*, and entirely misses the crucial question of excessive time taken at the preordering stage.

BellSouth relies on its LENS system to provide OSS at the preordering and ordering stage. The Administrative Law Judge in this case confirmed the inadequacies of the LENS system, finding specifically that the LENS system "is not set up to interact directly with a competitor's own operational support systems, and, instead, requires manual input," while "many of BellSouth's own operational support systems can communicate with each other, without manual intervention." *Recommended Decision* (August 14, 1977) at 26-27. The ALJ also found (in reliance on the testimony of BellSouth's own witness) that "competitors are limited by LENS to reserving six lines at a time" while BellSouth itself is not so limited. *Recommended Decision* (August 14, 1997) at 26.

A system requiring significant manual intervention is particularly unreliable as a basis for finding nondiscriminatory access. *Ameritech* ¶ 172. Even if there is no discrimination presently (which BellSouth's data do not show), as the number of orders increases, manual systems are particularly susceptible to backlogs, as well as to informal preferential treatment for in-house personnel. *Id.*

The Louisiana Public Service Commission, with two Commissioners in dissent, summarily brushed aside the ALJ's findings on OSS in a single sentence, saying only that "[f]ollowing careful consideration and analysis, the Commission concludes that the Operational Support Systems do in fact work and operate to allow potential competitors full non-discriminatory access to the BellSouth system." Louisiana Decision at 15. But the Louisiana Commission's decision says nothing about the issue of manual intervention or multi-line orders, or the other specific points raised by the ALJ. Such a conclusory decision, unsupported by any explanation addressed to the specific issues raised by the ALJ, is entitled to no deference. An agency's decision that would otherwise be entitled to deference is "vulnerable" if it reverses its ALJ while "fail[ing] to reflect attentive consideration of the ALJ's decision." *Dodson v. National Transp. Safety Board*, 644 F.2d 647, 651 (7th Cir. 1981). The Louisiana Commission reversed its own ALJ on the OSS issue without giving "its reasons for taking a different course." *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 853 (D.C. Cir. 1970). On that ground alone, the Louisiana Commission's decision cannot stand.

Moreover, the Louisiana Commission's decision is in disagreement with two other State Commissions in BellSouth's region on the issue of OSS compliance. On October 16, 1997, the Alabama Public Service Commission suspended its proceedings under section 271 on the compliance of BellSouth's SGAT with the competitive checklist, pending the outcome of further proceedings on the adequacy of BellSouth's OSS and on establishment of permanent cost-based rates. With respect to OSS compliance, the Alabama Commission concluded:

> It appears to us that BellSouth's OSS interfaces must be further revised to provide nondiscriminatory access to BellSouth's OSS systems as required by § 251(c)(3) of the '96 Act. We have concerns that such nondiscriminatory access is not currently being provided.[5/]

In addition, on November 19, 1997, the Florida Public Service Commission issued an order concluding that BellSouth had not met the requirements for interLATA authority in Florida, and finding specifically that BellSouth's OSS performance was not adequate:

> A major area of concern with respect to the interfaces offered by BellSouth is the amount of manual intervention that is required on behalf of an ALEC service representative. <u>The amount of manual intervention required when placing a non-complex order via the EDI interface is far in excess of how BellSouth would place the same order</u>. <u>The primary problem is that Bell South does not provide a pre-ordering interface that is integrated with an ordering interface that provides these functions in essentially the same time and manner as BellSouth's internal systems</u>. . . . .
>
> In summary, we find that the interfaces and processes offered by

[5/] Decision at p. 7. A copy of the decision of the Alabama Public Service Commission was attached to the DOJ Comments in the South Carolina proceeding as Exhibit 5.

> BellSouth do not permit an ALEC to perform an OSS function in substantially the same time and manner as BellSouth performs the functions for itself. . . . .

Florida Public Service Commission, *Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*, Dkt. 960786-TL (Nov. 19, 1997) at §§ VI.B.3.j, VI.M.4 (emphasis added).

BellSouth concedes that it "uses the same processes with respect to checklist items in all of its nine states." BellSouth Brief at 39. Clearly, the Commission cannot arrive at different decisions in Louisiana than in Florida or Alabama, when the facts are the same. The Commission must "apply a uniform standard for all states in a BOC's region, and a uniform standard that applies to all BOCs." DOJ South Carolina Comments at 15.

At the very least, the ALJ's findings describing the inadequacy of the LENS system create at least serious doubts as to the system's adequacy, sufficient to justify an insistence on comparative performance data before the Commission concludes that the system can be relied on to provide adequate and non-discriminatory service.

CONCLUSION

For the foregoing reasons, the Commission should find that BellSouth has failed to satisfy the competitive checklist because: (1) it does not provide reciprocal compensation; and

(2) it does not provide nondiscriminatory OSS functions for accessing unbundled network elements and resold services. *See* 47 U.S.C. §§ 271(c)(2)(B)(ii), (xiii), & (xiv).

Respectfully submitted,

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November 25, 1997

Attachment

Excerpts from Interconnection Agreement
Between BellSouth Telecommunications, Inc.
and Entergy Hyperion Telecommunications of Louisiana,
dated November 7, 1997

forth in the Customer Billing Data Attachment of this Agreement and compensate the other for the lost MPB billing data.

3.9 In the event Hyperion purchases from BellSouth Network Elements, or Combination thereof, in a LATA other than the LATA to or from which the MPB services are homed and in which BellSouth operates an access tandem, BellSouth shall, except in instances of capacity limitations, permit and enable Hyperion to sub-tend the BellSouth access tandem switch(es) nearest to the Hyperion rating point(s) associated with the NPA-NXX(s) to/from which the MPB services are homed. In instances of capacity limitation at a given access tandem switch, Hyperion shall be allowed to sub-tend the next-nearest BellSouth access tandem switch in which sufficient capacity is available. The MPB percentages for each new rating point/access tandem pair shall be calculated in accordance with MECAB and MECOD.

3.10 Neither Hyperion nor BellSouth will charge the other for the services rendered, or for information provided pursuant to Section 4 of this Attachment except those MPB charges specifically set forth herein. Both Parties will provide the other a single point of contact to handle any MPB questions.

4. Collocation

When Hyperion collocates with BellSouth in BellSouth's facility as described in this Agreement, capital expenditures (e.g., costs associated with building the "cage"), shall not be included in the bill provided to Hyperion pursuant to this Attachment. All such capital expenses shall be given a unique BAN (as defined in Section 7, below) and invoice number. All invoices for capital expenses shall be sent to the location specified by Hyperion for payment. All other non-capital recurring collocation expenses shall be billed to Hyperion in accordance with this Agreement. The CABS Billing Output Specifications ("BOS") documents provide the guidelines on how to bill the charges associated with collocation. The bill label for those collocation charges shall be entitled "Expanded Interconnection Service." For those nonmechanized bills, the bill label for non-capital recurring collocation expenses shall be entitled "Collocation".

5. Mutual Compensation

5.1 The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer. Such Local Traffic shall be recorded and transmitted to Hyperion and BellSouth in accordance with this Attachment. When an

Hyperion Customer originates traffic and Hyperion sends it to BellSouth for termination, Hyperion will determine whether the traffic is local or intraLATA toll. When a BellSouth Customer originates traffic and BellSouth sends it to Hyperion for termination, BellSouth will determine whether the traffic is local or intraLATA toll. Each Party will provide the other with information that will allow it to distinguish local from intraLATA toll traffic. At a minimum, each Party shall utilize NXXs in such a way that the other Party shall be able to distinguish local from intraLATA toll traffic. When Hyperion interconnects with BellSouth's network for the purpose of completing local and intraLATA toll traffic, Hyperion will, at its option, interconnect at either the tandem or end office switch to complete such calls paying local interconnection rates for its customers' local calls and switched access rates for its customers' intraLATA toll calls. Such interconnection will be ordered as needed by Hyperion to complete such local and intraLATA toll calls. Further, the Local Traffic exchanged pursuant to this Attachment shall be measured in billing minutes of use and shall be in actual conversation seconds. The total conversation seconds per chargeable traffic type will be totaled for the entire monthly billing cycle and then rounded to the next whole conversation minute. Reciprocal compensation for the termination of this Local Traffic shall be in accordance with Part IV to this Agreement.

6. **Local Number Portability**

6.1 **DELETED**

6.2 When an IXC terminates an interLATA or IntraLATA toll call to an Hyperion local exchange customer whose telephone number has been ported from BellSouth, the Parties agree that Hyperion shall receive those IXC access charges associated with end office switching, local transport, RIC and CCL, as appropriate. BellSouth shall receive any access tandem fees, dedicated and common transport charges, to the extent provided by BellSouth, and any INP fees (i.e., such as RCF charges) set forth in this Agreement. When a call for which access charges are not applicable is terminated to an Hyperion local exchange customer whose telephone number has been ported from BellSouth, and is terminated on Hyperion's own switch, the Parties agree that the mutual compensation arrangements described in this Agreement shall apply.

7. **Issuance of Bills - General**

7.1 BellSouth and Hyperion will issue all bills in accordance with the terms and conditions set forth in this Section. BellSouth and Hyperion will establish monthly billing dates ("Bill Date") for each Billing Account Number ("BAN"), A LIDB also contains validation data for collect and third number-billed calls, which include billed number screening.

"Local Exchange Carrier" is as defined in the Act.

"Local Number Portability (LNP)" means Interim Number Portability (INP) or Permanent Number Portability (PNP).

"Local Number Portability Database" supplies routing numbers for calls involving numbers that have been ported from one local service provider to another and is further defined in Attachment 2, Section 13.3.1.

"Local Service" has the meaning set forth in Section 1 of the General Terms and Conditions.

"Local Switching" has the meaning set forth in Attachment 2, Section 7.1.

"Local Traffic" - means any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which Hyperion is not directly interconnected.

"Loop" or "Loop Combination" has the meaning set forth in Attachment 2, Section 2.1.1.

"Loop Concentrator/Multiplexer" has the meaning set forth in Attachment 2, Section 5.1.

"Loop Distribution" has the meaning set forth in Attachment 2, Section 4.

"Loop Feeder" has the meaning set forth in Attachment 2, Section 6.1.1.

"MECAB" means the Multiple Exchange Carrier Access Billing document prepared under the direction the Billing Committee of the OBF. The Multiple Exchange Carrier Access Billing document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of access and other connectivity services provided by two or more LECs (including LECs and CLECs), or by one LEC or CLEC in two or more states within a single LATA.

"MECOD" means the Multiple Exchange Carriers Ordering and Design (MECOD) Guidelines for Access Services- Industry Support Interface, a document developed under the auspices of the Billing Committee of the OBF. The MECOD document, published by Bellcore as Special Report SR STS-

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. IN OPPOSITION TO BELLSOUTH'S APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA were served to each on the attached mailing list, either by Hand Delivery (as designated with an asterisk (*)), or by First Class Mail, postage prepaid, this 25th day of November 1997.

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